

May 9, 2005

Civil Division-Kent County (739-7641)

Ms. Charlotte Hale  
Staff Reporter  
The News Journal  
P.O. Box 15505  
Wilmington, DE 19850

Re: **Freedom of Information Act Complaint  
Against New Castle County Council**

Dear Ms. Hale:

Our Office received your Freedom of Information Act ("FOIA") complaint on March 21, 2005 alleging that the Personnel Committee of the New Castle County Council ("the Personnel Committee") violated the open meeting requirements of FOIA.<sup>1</sup> The Personnel Committee met in executive session on March 14, 2005 to discuss the qualifications of the two finalists for the position of counsel to the County Council. You acknowledge that the Personnel Committee met in executive session for a purpose authorized by law. See 29 Del. C. § 10004(b)(1) (authorizing executive session to discuss "an individual citizen's qualifications to hold a job"). You allege that the Personnel Committee violated the open meeting requirements of FOIA when it returned to public session and "cast votes for 'Candidate A' or 'Candidate B' without identifying these two individuals."

---

<sup>1</sup> In your letter dated March 18, 2005 (received by our Office on March 21, 2005), you asked us to expedite our investigation and written determination because "the same committee is scheduled to vote on a similar matter as soon as March 21. A ruling on the March 14 vote could help clarify the procedures the committee should follow in subsequent votes." As State Solicitor Malcolm S. Cobin explained by telephone to one of your editors, it was not possible for us to investigate and make a written determination in such a short time frame.

You acknowledge that the next day “County Council President Paul Clark revealed the name of only one of the two candidates in a voluntary phone call to The News Journal” but he “would not confirm the identity of the second applicant, known as Candidate ‘B.’” You contend that the use of code names during the voting process “effectively denies the public the right to ‘monitor the decisions that are made by . . . [public] officials in formulating and executing public policy,’ as required under 29 Del. C. Sec. 10001.”

By letter dated March 23, 2005, we asked the Council to respond to your complaint within ten days. The Council asked for a brief extension of time, which we granted. We received the Council’s response on April 12, 2005. We asked the Council for copies of the minutes of the meeting of the March 14, 2005 Personnel Committee meeting (public and executive sessions), which we received on April 19, 2005.<sup>2</sup> We asked the Council for additional information which we received on April 21, 2005.

The Council provided us with a copy of the agenda for the March 14, 2005, which stated that the Personnel Committee “will go into Executive Session to discuss an individual’s qualifications to hold a job (interviews) pursuant to *Del. Code Title 29 Sec. 10004(b)(1)*.” According to the Council, after the executive session, “the Chairman of the Committee announced in public session that a vote would be taken on extending a tentative offer to one of the two candidates, who were identified as Candidate A and Candidate B. . . . [O]nce a vote was proposed to extend such an offer, including a proposed salary, to one candidate, the candidate’s name could be disclosed and a hiring offer extended. A vote was taken in public session to tender a tentative officer to Candidate A.”

---

<sup>2</sup> The Council informed us that the minutes of the executive session held on March 14, 2005 had been typed but not yet approved, and provided them to us for our *in camera* review with that caveat.

According to the Council, the position of counsel to the Council was posted on the Council's website and other places; applications were received from a number of attorneys. The Council's deputy clerk screened the applications for minimum job qualifications. The Council met in executive session to interview the remaining candidates, narrowing the field down to two finalists. The deputy clerk then called the references whom the two finalists authorized to be contacted in their applications.<sup>3</sup>

The minutes of the Personnel Committee meeting confirm that after calling the March 14, 2005 meeting to order, a motion was made and approved to go into executive session to conduct interviews for the counsel to Council position. The minutes of the executive session show that members of the Personnel Committee questioned the two finalists on their legal and employment background and experience. After interviewing the two candidates, the Committee discussed their comparative qualifications.

After the Committee came out of executive session, the members voted in public for Candidate "A" or Candidate "B." The minutes of the public session record the votes of each individual member of the Committee by name and the candidate he or she voted for. By a vote of 7-6, the Committee approved the hiring of candidate "A."

According to the Council, it did not release the name of Candidate "A" immediately after the vote to give some time for Candidate "A" to accept the position at an agreed-upon salary. The Council explains that it continued to have privacy concerns: if, for some reason, Candidate "A" did not accept the position on the terms offered, then she would not want it disclosed to her current

---

<sup>3</sup> Candidate A listed an attorney with a former employer as a reference, but did not list anyone at her current place of employment. Candidate B listed a former co-worker and one immediate supervisor with her current employer.

employer that she had been looking for other employment. The Personnel Committee next met on March 21, 2005. The agenda for that meeting disclosed that the new counsel to the Council was Wendy, R. Danner, Esquire.

#### Relevant Statutes

FOIA requires that “[e]very meeting of all public bodies shall be open to the public except those closed pursuant to subsections (b), (c), (d) and (g) of this section” 29 Del. C. §10004(a).

Subsection (b) authorizes a public body to meet “in an executive session closed to the public” to discuss nine different topics, including: “Discussion of an individual citizen’s qualifications to hold a job or pursue training unless the citizen requests that such a meeting be open.” 29 Del. C. §10004(b)(1).

FOIA requires a public body to “maintain minutes, including executive sessions, conducted pursuant to this section . . . Such minutes shall include a record of those members present and a record, by individual members . . . of each vote taken and action agreed upon.” 29 Del. C. § 10004(f).

Legal Authority

In *Att’y Gen. Op.* 99-IB03 (Apr. 28, 1999), we determined that the town lawfully met in executive session to discuss the hiring of a new town manager. The complaining citizen contended that the town did not adequately disclose in the agenda the reason it would meet in executive session (the agenda listed for executive session “Personnel Matter”). We determined that FOIA did not require “the Town to disclose in the agenda the name or names of applicants for a job. For sound policy reasons, job applicants have a right of privacy to information disclosed during the application process, at least until they are hired.” “[D]isclosure may embarrass or harm an applicant who failed to get a job. Their present employers, co-workers, and prospective employers, should they seek new work, may learn that other people were deemed better qualified for a competitive position.” *Att’y Gen. Op.* 99-IB03 (quoting Core v. United States, 730 F.2d 946, 949 (4<sup>th</sup> Cir. 1984)).

In *Att’y Gen. Op.* 02-IB17 (Aug. 6, 2002), we determined that the school district violated the open meeting requirements of FOIA several times during the selection process for a new school superintendent. The school district did not violate FOIA by meeting in private for “interviews and discussion of the applicants’ job qualifications, which are appropriate subjects for executive session.” We determined, however, that after the school district made site visits to the schools where the final three applicants worked, “the three applicants did not have a reasonable expectation of privacy to justify an executive session under Section 10004(b)(1). Their current employers had to be aware of their application through reference checks and the site visits.”

*Att’y Gen. Op.* 02-IB17 (Aug. 6, 2002) is distinguishable. Here, the two final applicants had a reasonable expectation of privacy until such time as the Council voted to hire one of them and extend an offer of public employment. Candidate A did not list anybody from her current employer

as an authorized reference to contact. Candidate B listed her immediate supervisor, but we do not believe that by doing so she gave up all expectation of privacy. There is nothing in the record that is analogous to the highly public site visits that occurred in *Att’y Gen. Op.* 02-IB17 for the three finalists for the position of school superintendent.<sup>4</sup>

Your complaint also raises an issue whether the Council complied with the requirements under FOIA for recording votes on matters of public business. FOIA requires a public body to prepare and maintain minutes of every meeting. “Such minutes shall include a record of those members present and a record, by individual members . . . of each vote taken and action agreed upon.” 29 Del. C. § 10004(f). The term “action agreed upon” is fairly general, and we interpret it only to require that the minutes indicate the nature of the public business voted on by the public body.

For privacy reasons, FOIA does not require a public body to identify by name in the agenda the candidates for a job whose qualifications can lawfully be discussed in executive session. By the same rationale, we determine that FOIA does not require, in the case of a new job applicant, that the public body disclose the name of the individual candidates at the time of the vote in public session. When a job offer is extended and accepted, the name of the job applicant necessarily will become public, and the public will know, from the minutes, which members of the public body voted to hire that applicant.

### Conclusion

---

<sup>4</sup> We note that in *Att’y Gen. Op.* 02-IB17 the school district allowed the public to meet and question the three finalists at a public meeting (code-named Candidate “A,” “B,” and “C”). All three finalists, however, were from out of state and not likely to be known by name to the local audience. In contrast, the two finalists for the position of counsel to the Council were both well-known attorneys in New Castle County.

Ms. Charlotte Hale  
May 9, 2005  
Page 7

For the foregoing reasons, we determine that the Personnel Committee did not violate the open meeting requirements of FOIA when it voted, in public session, which of two final candidates to hire as counsel to the Council without disclosing, at the time of the vote, the names of the two candidates. FOIA only required the votes of the individual members of the Committee to be counted and memorialized in the minutes as to how each member voted. After Candidate "A" accepted the position and her name disclosed, it was clear to the public which members of the Committee had voted for Candidate "A" and which members had preferred another attorney. Under these circumstances, we do not believe that the public was deprived of a meaningful opportunity to monitor their government in action. The Committee struck a reasonable balance between the privacy rights of the applicants, and the public's right-to-know consistent with previous opinions of our Office.

Very truly yours,

W. Michael Tupman  
Deputy Attorney General

APPROVED:

---

Malcolm S. Cobin  
State Solicitor

cc: The Honorable M. Jane Brady  
Attorney General

Lawrence W. Lewis, Esquire  
Deputy Attorney General

Leonard E. Collins, Jr., Esquire  
Assistant Counsel to the Council

Ms. Charlotte Hale  
May 9, 2005  
Page 8

Phillip G. Johnson  
Opinion Coordinator